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JOHN E. ABDO, as Trustee of the JOHN E. ABDO

14 TRUST DATED JUNE 11, 2014, and JOHN E. ABDO,

as Trustee of the JOHN E. ABDO TRUST

15 DATED MARCH 15, 1976

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA

18 JOHN E. ABDO, as Trustee of the JOHN E.
19 ABDO TRUST DATED JUNE 11, 2014, and
20 JOHN E. ABDO, as Trustee of the JOHN E.
ABDO TRUST DATED MARCH 15, 1976,

21 Plaintiffs,

22 v.

23 MICHAEL R. FITZSIMMONS, PETER LAI,
24 CHRISTOPHER G. POWER, PETER J.
GOETNER, CHRISTIAN BORCHER,
25 ERNEST D. DEL, MARC S. YI, JAMES C.
PETERS, and SOUHEIL S. BADRAN,

26 Defendants.

Case No.:

**COMPLAINT FOR VIOLATION OF
FEDERAL SECURITIES LAWS,
INTENTIONAL MISREPRESENTATION,
& NEGLIGENT MISREPRESENTATION**

DEMAND FOR JURY TRIAL

INTRODUCTION

1
2 1. This is a securities fraud action against Delivery Agent, Inc.’s (“Delivery Agent”)
3 Chief Executive Officer, Michael R. Fitzsimmons (“Fitzsimmons”), and other of Delivery
4 Agent’s former and current officers/directors. This civil action is brought pursuant to Sections
5 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) and SEC Rule
6 10b-5 (17 C.F.R. § 240.10b-5). Plaintiffs also assert causes of action for intentional and
7 negligent misrepresentation.

8 2. Delivery Agent is a company in the burgeoning television-commerce space,
9 known as “t-commerce.” Delivery Agent claimed that it developed proprietary, interactive
10 technology to connect television viewers to the products they see on TV so that they can
11 instantly purchase those products through their smart TV using the TV’s remote control or
12 another device.

13 3. From at least May 2014 through and including April 2016, Delivery Agent
14 directly issued and sold securities to investors, including Plaintiffs, in the form of preferred
15 stock, stock warrants, convertible promissory notes, and other securities, all with the goal of
16 covering what was represented as short-term cash-flow negatives (a “burn rate”) that was to end
17 by both positive cash flow from operations and an Initial Public Offering (“IPO”).

18 4. At all times relevant, Delivery Agent claimed through its officers and/or directors
19 that Delivery Agent’s interactive technology worked, that it had been proven to be accepted by
20 and used in market tests, and was proprietary. Relying on those representations, Plaintiffs
21 purchased \$18 million in securities from Delivery Agent from May 2014 through and including
22 April 2016.

23 5. In truth and fact, Delivery Agent’s officers and/or directors concealed and failed
24 to timely disclose to Plaintiffs highly damaging information about the functionality and
25 proprietary nature of Delivery Agent’s core technology and the trustworthiness of its most senior
26 executives. Specifically,

- 27 a) Delivery Agent’s officers and directors failed to timely disclose to
28 Plaintiffs that the first-ever live demonstration of its core technology in
a television commercial during the February 2014 Super Bowl was a

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complete failure because viewers were unable to use Delivery Agent's technology to purchase products featured in the commercial directly from their TVs as Delivery Agent intended and represented they would;

b) Compounding the technological failure, Delivery Agent's officers and directors failed to timely disclose that Fitzsimmons, Delivery Agent's CEO, directed corporate officers and others to purchase the products featured in the Super Bowl commercial and subsequently disseminated false and fabricated sales reports claiming that the Super Bowl advertising campaign was a success, when it was actually an abject failure;

c) As a result of the Super Bowl advertisement fraud perpetrated by Fitzsimmons and the other defendants, Delivery Agent's then-auditor informed Delivery Agent that it could no longer rely on the representations of certain senior officers in its audits of the company's books, which led Delivery Agent to fire the auditor and all but ensure that Delivery Agent could never complete an IPO and become a publicly traded company; and

d) Representations that Delivery Agent's technology was proprietary were false and/or misleading.

6. In furtherance of their fraudulent scheme, the Defendants continued raising cash through securities offerings even though the Defendants knew that the Super Bowl ad failure and the subsequent corporate cover-up all but ensured that Delivery Agent could never sell stock to the public in an IPO.

7. As a result of the Super Bowl failure and subsequent omissions and/or false and misleading statements made by the Defendants, Delivery Agent never went public. Without a public offering and without functioning, proprietary technology, Delivery Agent was unable to attract a buyer or raise more cash, leading Delivery Agent to file for Chapter 11 bankruptcy protection in September 2016.

8. As a direct and proximate result of this fraudulent scheme, Plaintiffs' securities are now worthless.

PARTIES

9. Plaintiff John E. Abdo brings this lawsuit as the Trustee of the John E. Abdo Trust Dated June 11, 2014 (the "Abdo 2014 Trust"). The Abdo 2014 Trust is an express, legal trust that purchased \$15 million in securities from Delivery Agent.

10. Plaintiff John E. Abdo brings this lawsuit as the Trustee of the John E. Abdo

1 Trust Dated March 15, 1976 (the “Abdo 1976 Trust”). The Abdo 1976 Trust is an express, legal
2 trust that purchased \$3 million in securities from Delivery Agent.

3 11. John E. Abdo is domiciled in and is a citizen of Florida.

4 12. The Abdo 2014 Trust and the Abdo 1976 Trust are collectively referred to herein
5 as “the Plaintiffs.”

6 13. Defendant Michael R. Fitzsimmons (“Fitzsimmons”) was at all relevant times
7 Delivery Agent’s Chief Executive Officer and a member of Delivery Agent’s Board of
8 Directors. Fitzsimmons is domiciled in and is a citizen of California.

9 14. Defendant Peter Lai (“Lai”) was at all relevant times Delivery Agent’s President
10 and Chief Operating Officer until approximately January 2015 and thereafter was Delivery
11 Agent’s President of Ecommerce. Upon information and belief, Lai is currently domiciled in
12 and is a citizen of California, but his last known address is in the State of Washington.

13 15. Defendant Christopher G. Power (“Power”) was at all relevant times a member of
14 Delivery Agent’s Board of Directors and the Chairman of the Audit Committee. Power is
15 domiciled in and is a citizen of Colorado.

16 16. Defendant Peter J. Goetner (“Goetner”) was at all relevant times a member of
17 Delivery Agent’s Board of Directors, a member of the Audit Committee, and a member of the
18 Nominating and Governance Committee. Goetner is domiciled in and is a citizen of California.

19 17. Defendant Christian Borchert (“Borchert”) was at all relevant times a member of
20 Delivery Agent’s Board of Directors, a member of the Audit Committee, and Chairman of the
21 Nominating and Governance Committee. Borchert is domiciled in and is a citizen of California.

22 18. Defendant Ernest D. Del (“Del”) was at all relevant times a member of Delivery
23 Agent’s Board of Directors. Del is domiciled in and is a citizen of California.

24 19. Defendant Marc S. Yi (“Yi”) was at all relevant times a member of Delivery
25 Agent’s Board of Directors and a member of the Nominating and Governance Committee. Yi is
26 domiciled in and is a citizen of California.

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VENUE

27. At all times relevant, Delivery Agent maintained its principal office and place of business in San Francisco, California.

28. Venue is proper in this District pursuant to Section 27 of the Exchange Act and 28 U.S.C. § 1391(b). The securities that are the subject of this lawsuit and the alleged omissions of material fact, as well as false and misleading statements, were made in or issued from this District. In addition, upon information and belief, at least one of the Defendants resides in this District.

INTRADISTRICT ASSIGNMENT

29. A substantial part of the events and omissions giving rise to this action occurred in San Francisco, California. This action should therefore be assigned to the San Francisco Division pursuant to Civil Local Rules 3-2(c) and (d).

SUBSTANTIVE ALLEGATIONS

Background

30. Delivery Agent is a “t-commerce,” or television-commerce, company founded in 2005 that claimed to interactively connect TV viewers to the products they see on their smart televisions. The core of Delivery Agent’s purportedly groundbreaking business is an allegedly proprietary technology that allows a TV viewer to instantly and directly purchase goods, such as an article of clothing appearing in a TV commercial or worn by an actor in a TV show, using a smart television’s remote control or a mobile device.

31. Super Bowl XLVIII, which was played on February 2, 2014, was the first time that Delivery Agent’s interactive technology was used in a TV commercial broadcast to the general public. Delivery Agent partnered with popular clothing retailer H&M for the Super Bowl commercial that featured international soccer star David Beckham’s clothing line. According to Delivery Agent, anyone watching that commercial would be able to use Delivery Agent’s interactive technology to order the clothing items in the commercial directly from their smart TV using their remote control.

32. In a press release issued prior to the Super Bowl, Fitzsimmons described Delivery Agent's interactive technology as a "game-changer for the advertising industry." (Delivery Agent Press Release, *Delivery Agent Powers the First Shoppable TV Commercial Bringing T-Commerce to Life at CES 2014*, Jan. 6, 2014, available at <http://www.deliveryagent.com/press-releases/hm-and-david-beckham-are-back-in-action-at-the-super-bowl-with-groundbreaking-campaign>).

33. Fitzsimmons further described the Super Bowl commercial as an "industry first" and groundbreaking: "Years ago, the world talked about the potential associated with buying Jennifer Aniston's sweater. H&M, in an industry first, will now realize that potential by making their Super Bowl XLVIII ad actionable and directly measurable." (Delivery Agent Press Release, *Delivery Agent Powers the First Shoppable TV Commercial Bringing T-Commerce to Life at CES 2014*, Jan. 6, 2014, available at <http://www.deliveryagent.com/press-releases/hm-and-david-beckham-are-back-in-action-at-the-super-bowl-with-groundbreaking-campaign>).

In Preparing to Go Public, Delivery Agent Directly Sold Securities to Plaintiffs

34. In or about 2014, the same year that the Super Bowl H&M commercial aired to the public, Fitzsimmons represented to Plaintiffs and others that Delivery Agent planned on going public before the end of 2014. To that end, Delivery Agent directly sold securities to Plaintiffs and others to raise funds to establish a viable business that would be attractive to public investors in the planned IPO. This action arises from Delivery Agent's sale of Series F Preferred Stock, Series G Preferred Stock, Stock Warrants, and Convertible Promissory Notes (collectively, the "Securities") to Plaintiffs from 2014 through and including 2016.

35. Preferred Stock is kind of stock or equity that gives the holder certain rights superior to those of common stock owners. The Series F and Series G Preferred Stock sold by Delivery Agent to Plaintiffs are securities.

36. A Stock Warrant is a security that allows the holder of the warrant to buy stock of the underlying company at a fixed price during a fixed time period. The Stock Warrants sold by Delivery Agent to Plaintiff Abdo 2014 Trust are securities.

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37. A Convertible Promissory Note is a debt instrument that is convertible into equity securities upon the occurrence of certain defined events. The Convertible Promissory Notes sold by Delivery Agent to Plaintiffs are securities.

38. Delivery Agent sold the Securities to Plaintiffs pursuant to Rule 506 of Regulation D of the Securities Act of 1933 ("Securities Act"), which creates an exemption to registration requirements for the sale of securities. Securities offerings under Rule 506 are commonly referred to a "private placements."

39. Specifically, Plaintiffs purchased securities totaling \$18,000,000 from Delivery Agent as set forth below:

| Purchase Date | Purchaser | Amount Paid | No. of Shares | Security Purchased |
|---------------|-----------------|-------------|---------------|---|
| 6/18/14 | Abdo 2014 Trust | \$5 million | 5,504,789 | Series F Preferred Stock and Warrant Purchase Agreement |
| 9/24/14 | Abdo 2014 Trust | \$5 million | 5,504,789 | Series F Preferred Stock |
| 1/13/15 | Abdo 2014 Trust | \$5 million | 5,504,789 | Series F Preferred Stock with 120-Day Warrant |
| 5/13/15 | Abdo 1976 Trust | \$1 million | 1,320,132 | Series G Preferred Stock and Warrant Purchase Agreement |
| 7/20/15 | Abdo 1976 Trust | \$1 million | N/A | Convertible Promissory Note |
| 4/20/16 | Abdo 1976 Trust | \$1 million | N/A | Convertible Promissory Note |

40. All of the Securities were issued by Delivery Agent pursuant to a vote of the Board of Directors.

41. The Series F Preferred Stock offerings were approved by a vote of Delivery Agent's Board of Directors on or about March 14, 2014.

42. The Series G Preferred Stock and Convertible Promissory Note offerings were approved by a vote of Delivery Agent's Board of Directors subsequent to the Series F Preferred Stock offerings.

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**Delivery Agent and the Defendants Represented
to Plaintiffs That Its Core Technology Worked**

43. In connection with the first sale of securities to Plaintiff Abdo 2014 Trust on June 18, 2014, and subsequent sales of securities to Plaintiffs, the Defendants prepared and disseminated or caused to be disseminated in interstate commerce certain written materials to Plaintiffs and others on or about May 12, 2014. Among those written materials was a PowerPoint presentation (the "PowerPoint") describing Delivery Agent and its technology.

44. The PowerPoint prominently featured portions of articles from AdAge and Variety published in January 2014 that described how Delivery Agent's technology would appear in a televised Super Bowl commercial the following month. The articles explained that Delivery Agent had partnered with H&M to use Delivery Agent's technology in connection with the sale of an H&M clothing line featuring products associated with international soccer star David Beckham. The articles said that TV viewers would be able to use their television's remote control to purchase items from David Beckham's clothing line from H&M.

45. The PowerPoint also explicitly linked Delivery Agent's desire to raise capital to preparing for the impending IPO. Under the heading "Capital Raise," the PowerPoint said that "Delivery Agent is seeking to raise \$35 million in a pre-IPO round to fund its key growth initiatives." Under the heading "Use of Proceeds," Delivery Agent listed the first item as "IPO readiness."

46. Also in connection with the first sale of securities to Plaintiff Abdo 2014 Trust on June 18, 2014, the Defendants prepared and/or approved a draft S-1 statement (the "Draft S-1") and disseminated a portion of it or caused it to be disseminated in interstate commerce to potential investors, including Plaintiffs.

47. "S-1" refers to Form S-1, a filing with the U.S. Securities and Exchange Commission ("SEC") required of companies that plan on an IPO. Form S-1 is also known as the registration statement.

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1 48. The Draft S-1 says, among other things, that Delivery Agent’s “technology and
2 relationships enable viewers to engage with, and transact in response to television content
3 anytime, anywhere and on any connected device.”

4 49. The Defendants claimed in the Draft S-1 that through Delivery Agent’s “end-to-
5 end engagement and commerce solution, we handle the entire transaction process for our
6 partners on a white-label basis, enabling viewers to . . . purchase products seen on TV shows,
7 sporting events, commercials and infomercials.”

8 50. In 2013, Delivery Agent’s technology “drove more than 75 million viewer
9 engagements with products and information from our partners’ content,” according to the Draft
10 S-1.

11 51. The Draft S-1 goes on to identify five examples of “how viewers interact and
12 engage with television content” through Delivery Agent’s “platform.” The first example was the
13 February 2014 Super Bowl campaign with H&M.

14 52. The Draft S-1 also says that the Super Bowl ad with H&M was a success and it
15 fails to mention any technical problems encountered with the technology: “[D]uring *Super Bowl*
16 *XLVIII*, viewers of H&M’s Super Bowl advertisement featuring David Beckham *were able to*
17 *buy the clothing featured in the advertisement directly from their remote control on enabled*
18 *TV’s.*” (Emphasis added).

19 53. In several places throughout the PowerPoint and the Draft S-1, the Defendants
20 claimed that Delivery Agent’s technology was proprietary. For example, the Draft S-1 described
21 Delivery Agent’s technology as its “proprietary omni-screen technology platform” and an
22 “integrated proprietary technology platform.” Delivery Agent even listed “[a]dvanced
23 proprietary technology” as one of its “Competitive Strengths” in the Draft S-1. The Draft S-1
24 further says, “Our solutions leverage proprietary technologies and data to enable real-time
25 transactions, engagements and optimizations across devices and platforms.”

26 54. The vast majority of Delivery Agent’s revenue for 2013 and 2014 was generated
27 by what Delivery Agent called “e-Commerce” or selling goods to TV viewers. According to the
28 PowerPoint, in 2013 and 2014, Delivery Agent generated 79.2% and 76.5% of its revenue from

1 e-commerce respectively, compared to 20.8% and 23.5% of revenue for those same years,
2 respectively, from advertising.

3 55. On January 9, 2015, the Defendants disseminated or caused to be disseminated to
4 two Delivery Agent investors an updated draft S-1 (the “Updated Draft S-1”) that continued to
5 claim that the February 2014 Super Bowl advertising demonstration was a success.

6 56. That same day, Plaintiff Abdo 2014 Trust received a copy of the Updated Draft S-
7 1 and relied upon the representations therein before purchasing \$5 million in securities from
8 Delivery Agent on January 13, 2015.

9 57. Plaintiffs reasonably relied on the statements in the PowerPoint, the Draft S-1, the
10 Updated Draft S-1, and other representations made by the Defendants through Delivery Agent.

11
12 **Delivery Agent and the Defendants Failed to Disclose and**
13 **Concealed from Plaintiffs Material Information about the Failed**
Super Bowl Commercial and a Subsequent Attempted Cover-up

14 58. The day after the Super Bowl, Delivery Agent issued a press release in which
15 Fitzsimmons claimed that the H&M ad was a success: “‘H&M kicked-off a great campaign
16 during Super Bowl XLVIII to promote their David Beckham Bodywear Collection,’ said Mike
17 Fitzsimmons, Delivery Agent CEO. ‘That same campaign kicked-off a new paradigm for
18 advertising, fundamentally changing the discipline by making television advertising actionable
19 and measureable.’” (Delivery Agent Press Release, *Delivery Agent Extends Partnership with*
20 *H&M to Shop-enable Ad Campaign*, Feb. 3, 2104, available at
21 [http://www.deliveryagent.com/press-releases/delivery-agent-extends-partnership-with-hm-to-](http://www.deliveryagent.com/press-releases/delivery-agent-extends-partnership-with-hm-to-shop-enable-ad-campaign)
22 [shop-enable-ad-campaign](http://www.deliveryagent.com/press-releases/delivery-agent-extends-partnership-with-hm-to-shop-enable-ad-campaign)).

23 59. Unbeknownst to Plaintiffs, Delivery Agent’s high-profile demonstration of its
24 technology during Super Bowl XLVIII on February 2, 2014, more than four months before
25 Plaintiff Abdo 2014 Trust’s first investment in Delivery Agent, was a complete failure.
26 Fitzsimmons’s claim the day after the Super Bowl that the ad campaign was a success was
27 intentionally false. Even worse, Delivery Agent and its most senior officers were directly
28

1 involved in a substantial corporate fraud and cover-up designed to hide the truth about the Super
2 Bowl ad campaign from Plaintiffs and others to induce Plaintiffs to purchase the Securities.

3 60. A few days after the Super Bowl, a whistleblower (the “Whistleblower”) came
4 forward to Delivery Agent’s then-auditor (the “Auditor”) with the truth about the H&M
5 commercial.

6 61. The Auditor is one of the “Big Four” accounting firms.

7 62. At the time, Delivery Agent had engaged the Auditor to audit Delivery Agent’s
8 consolidated financial statements as of December 31, 2012. The Auditor issued its report on
9 February 5, 2014, three days after Super Bowl XLVIII.

10 63. Among other things, the Whistleblower told the Auditor that:

- 11 a) The Super Bowl H&M campaign failed because TV viewers were
12 unable to buy items from David Beckham’s clothing line through their
13 TVs;
- 14 b) Fitzsimmons directed high-ranking Delivery Agent officers to
15 purchase the items featured in the commercial to give the appearance
16 that Delivery Agent’s technology had worked, when it had not; and
- 17 c) False and fabricated sales reports touting the H&M commercial a
18 success were generated and disseminated to third parties by Delivery
19 Agent and its officers and directors.

20 64. The Auditor subsequently informed Delivery Agent’s Audit Committee of the
21 allegations. The Audit Committee conducted an investigation and retained an outside law firm
22 (the “Law Firm”) to investigate the allegations. The Audit Committee’s and the Law Firm’s
23 findings were presented to the Audit Committee and the Board of Directors.

24 65. The Audit Committee and the Board of Directors agreed with the gravamen of the
25 Whistleblower’s allegations, finding that Delivery Agent’s senior management, including
26 Fitzsimmons and Lai, instructed other employees to purchase the items featured in the Super
27 Bowl ad because Delivery Agent’s interactive technology did not function properly. They also
28 agreed with the Whistleblower that Delivery Agent executives were involved in or aware of the
preparation of information containing fabricated data regarding the Super Bowl ad, including

1 information about performance and sales, which was provided to an advertising campaign
2 partner and third parties.

3 66. Although the Audit Committee and the Board of Directors basically substantiated
4 the Whistleblower's allegations, the Audit Committee and the Board of Directors concluded that
5 "the financial impact of the purchases was not material from a financial standpoint and had no
6 material adverse impact on the business or operations of the company," "there was no impact on
7 the integrity of our financial statements as a result of the matter" and "our current Chief
8 Executive Officer was not involved in the fabrication of data"

9 67. The Board of Directors also implemented the Audit Committee's recommended
10 remediation plan, which included "the adoption of more stringent business practices, policies
11 and procedures, including an ethics policy," "the establishment of stricter internal controls," "the
12 initiation of additional employee training," and "other personnel remedial measures, including
13 written warnings and/or the demotion or reduction in responsibilities for certain employees, lost
14 bonus awards for certain employees, and the termination of our then head of internet
15 advertising."

16 68. The Auditor was subsequently presented with reports of the Audit Committee's
17 and Law Firm's investigations and Delivery Agent's remedial actions.

18 69. The Auditor, however, rejected the Defendants' and Delivery Agent's attempt to
19 make light of a material breach of ethics by senior corporate officers. The ability of the Auditor
20 to rely on those officers ended, and with it, the willingness of the Auditor to provide the
21 accounting and auditing functions necessary to issue the audit opinions in connection with an
22 IPO also ended. The Auditor concluded in writing that it was "not willing to rely on the
23 representations" of Delivery Agent management involved in the Super Bowl debacle, including
24 Fitzsimmons and Lai, "for purposes of [the Auditor's] previously-completed audit" of Delivery
25 Agent's consolidated financial statements.

26 70. The Auditor further informed Delivery Agent that it would not be able to reissue
27 its previously issued audit report or continue with the December 31, 2013 audit if the persons
28 involved in fabricating data were involved with the accounting or internal controls, were in a

1 financial role at Delivery Agent, or in a supervisory role or a position to influence those in such
2 roles.

3 71. The Auditor also informed Delivery Agent that to complete its audit as of and for
4 the year ended in December 31, 2103, it would need to significantly expand the scope of its
5 previously completed 2012 audit and the incomplete 2013 audit to determine if any Delivery
6 Agent personnel inappropriately influenced the accounting or financial reporting.

7 72. Power, the Chairman of the Audit Committee, subsequently discussed the
8 Auditor's position with the Auditor. After that discussion, it was apparent that the Auditor
9 would not pay any heed to the conclusions of Delivery Agent's internal and external
10 "investigations."

11 73. The response of the Board of Directors was unanimous. It terminated the Auditor
12 on July 29, 2014. Delivery Agent subsequently dismissed the Auditor as its independent auditor
13 on August 4, 2014.

14 74. The obvious consequence of the termination of the Auditor was that Delivery
15 Agent could not complete an IPO. By terminating the Auditor, Delivery Agent triggered an
16 obligation under the federal securities laws for the company to explain the circumstances and
17 bases for terminating the Auditor. That explanation, known as Item 304, is required of all
18 companies that intend to go public. Even worse for Delivery Agent, the law governing Item 304
19 disclosures requires the dismissed auditor to write a response to the company's Item 304
20 disclosure. Both Item 304 and the Auditor's response are filed with and reviewed by the SEC
21 prior to an IPO.

22 75. Fitzsimmons, however, intentionally misled Plaintiffs about the reason the IPO
23 was continually delayed to fraudulently induce Plaintiffs to purchase the Securities. On October
24 13, 2014, eight months after the Super Bowl, Trustee for the Plaintiffs wrote an email to
25 Fitzsimmons to inquire if Delivery Agent intended to file the S-1 in November 2014 so that the
26 IPO could proceed in February 2015. That same day, Fitzsimmons replied as follows: "We are
27 having to do a carve-out audit of Music Today from Live Nation which is taking some time but
28 all good. The current plan is to confidential file in December [2014] and go out in March."

1 76. Fitzsimmons's response was intentionally false and misleading because it was
2 calculated to lead Plaintiffs to believe that an audit for Music Today that was "all good" was the
3 reason the IPO was delayed, when the truthful reason was that the IPO was effectively dead after
4 the disastrous H&M Super Bowl commercial and ensuing attempt to cover up the failure.

5 77. Even though the Defendants knew that an IPO was all but impossible, Delivery
6 Agent prepared a draft Item 304 (the "Draft Item 304") in July 2015 and sent it to the Auditor for
7 its response. In an email dated August 5, 2015, Fitzsimmons wrote to Plaintiffs that Delivery
8 Agent would be able to file for the IPO as soon as August 12th, "[a]ssuming [the Auditor] plays
9 along"

10 78. But the Auditor did not play along. Instead, the true extent of the fraud
11 perpetrated by Delivery Agent and the Defendants came to light. The Auditor's draft response
12 to Delivery Agent's Draft Item 304 filing was highly critical of Delivery Agent's portrayal of the
13 facts and its omission of several key facts.

14 79. Delivery Agent's Draft Item 304 attempted to downplay the significance of the
15 Super Bowl failure and subsequent acts by senior management that were intended to cover it up.
16 The Draft Item 304 said, in relevant part, only the following:

17 In February 2014, in connection with an interactive advertising campaign
18 involving the Company's technology, certain current and former employees,
19 and members of our senior management (including our current Chief
20 Executive Officer, our current President of eCommerce and our former head
21 of interactive advertising) instructed other employees to purchase, or make
22 purchases themselves, of merchandise that was offered for sale online as part
23 of the interactive advertising campaign on behalf of our advertising campaign
24 partner. These purchases involved merchandise owned by and held in
25 inventory of the Company, were in the amount of less than \$10,000, had no
26 financial impact, and were never recorded in the Company's books and
27 records.

28 In addition, within two business days, it was determined that some of the
Company's current and former employees and members of our senior
management also prepared information, or were involved in or aware of the
preparation of information, that contained fabricated data regarding the
performance of the advertising campaign, including regarding the sales of
merchandise during the campaign. The fabricated data was provided to one of
our advertising campaign partners and certain other third parties. When our
Chief Executive Officer learned that the data had been fabricated, he retracted
it from all recipients and instructed them that the data should not be relied
upon for any purposes. The Company believes that the data was not relied

1 upon by its advertising campaign partner or any third party, and the Company
2 maintains an ongoing business relationship with this advertising campaign
3 partner.

4 80. The Auditor's response to the Draft Item 304, by contrast, provided much more
5 damaging information describing an intentional effort by Delivery Agent's most senior officers
6 to conceal a catastrophic failure of Delivery Agent's core interactive technology, an effort to
7 falsify and fabricate data to make that failure appear like a success, and repeated attempts by
8 Fitzsimmons to obstruct the internal and external investigations into the Super Bowl fiasco.

9 81. The Auditor's response also made clear that several high-ranking corporate
10 officers purchased nearly all of the items advertised during the Super Bowl and did so to conceal
11 the fact that Delivery Agent's technology had failed and that TV viewers were unable to buy
12 nearly any of the advertised items:

13 In February 2014, in connection with the first interactive advertising
14 campaign to market merchandise offered for sale online on behalf of one of
15 the Company's advertising partners on super bowl Sunday, certain current and
16 former employees of the Company, and certain members of the Company's
17 senior management (including the current Chief Executive Officer (CEO), the
18 Company's current President of eCommerce and the Company's former head
19 of interactive advertising), instructed other employees of the Company to
20 purchase, or made purchases themselves, of 585 of 600 pieces of the
21 advertising partners' merchandise that was offered for sale as part of the
22 campaign. After receiving an update that only 15 pieces of merchandise had
23 been purchased hours into the super bowl, the current CEO directed the
24 former President and COO to "buy all remaining" merchandise.

25 Further, the CEO received an email during super bowl Sunday indicating the
26 advertising partners' representatives tried but could not access technology to
27 purchase their merchandise. The next day, the Chief Executive Officer agreed
28 to have the former President and COO email the advertising partner that they
29 sold out of all 1,100 pieces of merchandise (600 pieces of merchandise
30 offered for sale and 500 pieces of the same merchandise available for
31 giveaway). The same day, the CEO emailed the Board communicating
32 purchases of 711 pieces of their advertising partners' merchandise (which
33 unknown to the Board included the 585 of 600 merchandise pieces bought by
34 employees directed to do so by the CEO and other members of Senior
35 Management and 139 of 500 merchandise pieces available for the giveaway).
36 Two days after the advertising campaign, the CEO gave an update at a Board
37 meeting communicating the advertising campaign was a great success with no
38 discussion of the technology problems encountered or the 585 of 600 pieces
39 sold being acquired by Company personnel at the CEO's direction.

1 82. Upon information and belief, Lai is the “the former President and COO”
2 referenced in the Auditor’s response above. Lai is also referred to as the “current President of
3 eCommerce” in the Draft Item 304.

4 83. The Auditor’s response established that Fitzsimmons personally directed other
5 employees to make the purchases, that Fitzsimmons knew that the subsequent sales reports were
6 false, that the fabricated data was provided to an advertising partner, and that there was no
7 evidence that the fabricated data was withdrawn after it was disseminated:

8
9 We disagree with the implication in the third sentence in the fourth paragraph
10 where the Company’s disclosure states that “When our Chief Executive
11 Officer was advised that some of the data had been fabricated[,]” as he would
12 have known that data was fabricated in that it would either include employee
13 purchases he directed or included purchases to the advertising partner, Board
14 of Directors and later a potential investor or have required alteration to
remove the effect of these and he was made aware of the technology issues
from the advertising partner. As previously noted, subsequent to the
conclusion of the campaign the Chief Executive Officer reported the Board
that the campaign was a success, no mention of him directing employees to
make purchases or the inability of advertising partners and some employees to
access technology to purchase merchandise was mentioned.

15 Further, we understand that the Audit Committee’s external investigation team
16 later obtained evidence indicating that the CEO and others in Senior
17 Management directed the metrics to be altered further as 361 of 500 free units
18 offered in the campaign were not given away and sent the altered metrics to
19 the advertiser and potential investors. It was subsequently determined that
20 some of the Company’s current and former employees and certain members of
21 the Company’s senior management had prepared, or were aware of the
22 preparation of, information that contained fabricated data regarding the
23 performance of the above-referenced interactive advertising campaign,
including fabricated data regarding the amount of merchandise purchased
during the campaign. The fabricated data was provided to the advertising
campaign partner and to certain other third parties at the direction of the Chief
Executive Officer and others in Senior Management. Days after the campaign,
the CEO sent a potential investor the same report sent to the advertising
partner originally and stated ‘campaign massive success and is leading to an
extension[.]’

24 We disagree with the statement that “When our Chief Executive Officer was
25 advised that some of the data had been fabricated, the data was promptly
26 retracted from the recipients[.]” The investigation found no evidence that such
27 data was retracted and our Partner was told such had not been prior to our
28 termination. We have no basis to agree or disagree as to what has been
communicated since our termination, or whether the fabricated data was relied
upon by its advertising campaign partner or any third party or if the Company
maintains an ongoing business relationship with this advertising campaign
partner. We were told that that the investigation found that at the time of the
advertising campaign the CEO and members of Senior Management’s actions

1 demonstrated that the success of the super bowl Sunday advertising campaign
2 from a technological feasibility perspective was very important to the Board,
advertising campaign partners and potential investors at that time.

3 84. The Auditor went on to explain that the Draft Item 304 omitted that Fitzsimmons
4 improperly interfered with Delivery Agent's internal and external investigations into the Super
5 Bowl matter:

6 The allegation of fabricated data was brought to the attention of [the Auditor]
7 by an employee in senior management, and we in turn informed the Audit
8 Committee Chairman. Omitted from the Disclosure in fifth paragraph is that,
9 the Audit Committee investigated the matter, initially using internal resources
10 however, the internal investigation team experienced repeated interference
11 from the Chief Executive Officer. Despite clear communication from the
Audit committee of who was responsible for the investigation, the Chief
Executive Officer wanted certain individuals not to be a part of the internal
investigation team, tried to influence the scope of the investigation and caused
there to be delays in conducting email and other electronic searches.

12 Subsequently, the Audit Committee engaged an outside law firm to conduct
13 an independent investigation and prepare a report to the Audit Committee
14 regarding its findings. The scope of the Audit Committee's investigation was
15 (a) to investigate management's actions and conduct during the advertising
16 campaign, and also specifically (b) to investigate allegations of interference
17 with the audit committee's internal investigation by the Chief Executive
18 Officer and Senior management. Based upon the external investigation team,
we understand that the Audit Committee concluded that (a) the Chief
Executive Officer acknowledged his involvement in the purchase of products
by employees along with other members of Senior Management. While there
was evidence indicating the Chief Executive Officer's involvement in further
manipulation of data provided to advertising partners and others to make the
employee purchases appear as though they had come from customers the
Audit Committee believes such was inconclusive.

19 However, the Audit Committee believed conclusive evidence indicated that
20 certain members of senior management and employees were found to have
21 knowledge and involvement in the further manipulation of the advertising data
22 beyond the purchase of products and initial reporting of those purchases and
23 (iv) The Chief Executive Officer made repeated attempts to influence the
24 scope and composition of the Audit Committee's original internal
investigation prior to the Audit Committee engaging an external investigation
team and we were informed the CEO even tried to influence the scope with
the external investigation team.

25 85. All of the foregoing facts were material to any reasonable investor, including
26 Plaintiffs, engaged in making a decision to invest or not invest in Delivery Agent.

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1 86. The Defendants either directly concealed from Plaintiffs these facts or
2 participated in encouraging the additional investments in Delivery Agent knowing that these
3 facts were being concealed.

4 87. Had Plaintiffs known that the Super Bowl ad was a failure, that the Auditor had
5 been terminated because it refused to go along with the Defendants' fraud and declined to accept
6 the representations of managers who participated in it, or had Plaintiffs learned that an IPO could
7 not proceed under these circumstances, Plaintiffs would not have invested the first dollar into the
8 purchase of the Securities.

9
10 **In Furtherance of the Scheme, Delivery Agent and the Defendants**
11 **Made Misleading and Incomplete Disclosure of the Super Bowl Incident**
 to Induce Plaintiffs to Buy More Securities

12 88. Plaintiffs first learned of a potential dispute with the Auditor on or about March 9,
13 2015, after Plaintiff Abdo 2014 Trust had already purchased \$15 million in securities from
14 Delivery Agent. But even then, neither Delivery Agent nor the Defendants made a complete and
15 fair disclosure to Plaintiffs about the true nature and extent of the Super Bowl advertising failure
16 or the conduct of senior management following it. For example, on March 9, 2015, Fitzsimmons
17 falsely represented to Plaintiffs in a telephone call that the Super Bowl debacle was immaterial
18 and that the Auditor's position was unreasonable.

19 89. Instead of fully and fairly disclosing the relevant facts to Plaintiffs, Delivery
20 Agent and the Defendants embarked on a campaign to continue raising funds through the sale of
21 securities to Plaintiffs by falsely and fraudulently continuing to claim that Delivery Agent's IPO
22 was imminent.

23 90. On March 11, 2015, a few days after Plaintiffs learned of the potential dispute
24 with the Auditor, Delivery Agent released an investor update entitled "Q1 2015 Mid Q Investor
25 Update" (the "March 2015 Investor Update"). The March 2015 Investor Update stated that the
26 "IPO process [was] progressing with continued audit delays," but it did not disclose the nature or
27
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1 severity of those “audit delays,” nor did it disclose the Super Bowl ad failure or the subsequent
2 cover-up.

3 91. More to the point, and in furtherance of the scheme to continue selling securities
4 to Plaintiffs without full and fair disclosure of the Super Bowl catastrophe, the March 2015
5 Investor Update said that Delivery Agent, “Need[ed] to solve immediate cash issue.” It went on
6 to say that Delivery Agent was raising \$12 million in “Pre-IPO Bridge” funds.

7 92. On April 4, 2015, Fitzsimmons wrote in an email to Plaintiffs and others that
8 Delivery Agent “continue[s] to battle through roadblocks heading towards our IPO.”
9 Fitzsimmons identified “general market conditions” and the following “3 key issues” holding up
10 the IPO: an “SEC ruling on revenue recognition, 2014 audits and 304 disclosure.” Fitzsimmons
11 further added, “[t]here is nothing more humanly possible our team could be doing to achieve this
12 important milestone and we are working around the clock to resolve.” As a result of the IPO’s
13 delay, Fitzsimmons added that Delivery Agent was raising “additional equity financing” in the
14 form of Series G Convertible Preferred Stock.

15 93. It was not until August 19, 2015, that Plaintiffs obtained a copy of the Draft Item
16 304 and the Auditor’s response. By that point, Plaintiffs had purchased \$17 million in Securities
17 offered by Delivery Agent because Fitzsimmons and Delivery Agent continued to represent that
18 the IPO was still achievable and Plaintiffs had no reason to believe at that point that the Super
19 Bowl ad catastrophe would all but ensure that Delivery Agent would never go public.

20 94. Nonetheless, Delivery Agent continued telling Plaintiffs and others that an IPO
21 was still imminent. On January 14, 2016, Delivery Agent sent an update to key investors,
22 including Plaintiffs. The update stated that “304 nearing resolution,” meaning that Delivery
23 Agent had somehow worked out a solution to the Item 304 problem and that Delivery Agent had
24 a meeting with the Auditor the first week of February 2016. The update further stated that
25 Delivery Agent needed more cash and that Delivery Agent was exploring selling the company.

26 95. Plaintiff Abdo 1976 Trust purchased \$1 million in Convertible Note Financing
27 from Delivery Agent on April 20, 2016, in reliance on Delivery Agent’s representations that it
28

1 needed more cash to survive and that it was seeking to sell the company, which if successful
2 could have salvaged Plaintiffs' investments.

3 96. But that too was just another step in the scheme to defraud Plaintiffs. The
4 Defendants knew that a sale of the company was highly unlikely to generate enough cash to pay
5 Plaintiffs because Delivery Agent's supposedly proprietary technology was not proprietary and
6 was therefore far less valuable than the Defendants led Plaintiffs to believe.

7 **Delivery Agent's and the Defendants' Omissions and False Statements**
8 **Caused Plaintiffs to Lose the Entire Value of Their Investments**

9 97. In the end, Delivery Agent was unable to persuade the Auditor to retreat from or
10 soften the substance of its response to Delivery Agent's Draft Item 304. As a direct and
11 proximate result, the probability of an IPO was zero. The IPO was dead. Delivery Agent was
12 dead.

13 98. Delivery Agent employed investment bankers to broker a sale of Delivery Agent,
14 but learned that there were no buyers because Delivery Agent had no meaningful intellectual
15 property or ongoing business establishing any meaningful value.

16 99. Because Delivery Agent and the Defendants were revealed to have misled
17 investors who had previously provided Delivery Agent with the capital to meet its burn rate, no
18 additional investment was realized and Delivery Agent ran out of cash to operate the business.

19 100. On September 15, 2016, Delivery Agent filed for bankruptcy under Chapter 11 of
20 the Bankruptcy Code.

21 101. Plaintiffs' \$18 million investment in the Securities is now worthless.

22 **No Safe Harbor**

23
24 102. The statutory safe harbor provided for forward-looking statements under certain
25 circumstances does not apply to any of the allegedly false statements and omissions pleaded in
26 this Complaint because those statements and omissions are factual and relate to events in the past
27 rather than forward-looking events.

28 ///

1 103. None of the statements alleged herein are “forward-looking” statements, and no
2 such statement was identified as “forward looking” when it was made.

3 104. In the alternative, to the extent that the statutory safe harbor does apply, the
4 Defendants are still liable under federal securities laws for any forward-looking statements
5 because the speaker actually knew that the forward-looking statement was false, misleading, or
6 omitted facts necessary to make statements previously made not materially false or misleading.

7
8 **COUNT I**

9 For Violation of § 10(b) of the Exchange Act and Rule 10b-5
10 Against All Defendants

11 105. Plaintiffs incorporate ¶¶ 1 through 104 by reference.

12 106. This Count is asserted against all Defendants pursuant to Section 10(b) of the
13 Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated by the SEC under 17 C.F.R.
14 § 240.10b-5.

15 107. The Defendants employed devices, schemes, and artifices to defraud.

16 108. The Defendants failed to disclose material facts specified above that they had a
17 duty to disclose.

18 109. The Defendants made or approved the false and misleading statements specified
19 above, which they knew were false and misleading in that they contained misrepresentations and
20 failed to disclose material facts necessary in order to make the statements made, in light of the
21 circumstances under which they were made, not misleading.

22 110. The Defendants, individually and in concert, directly and indirectly, by the use,
23 means, or instrumentalities of interstate commerce and/or of the mails, engaged and participated
24 in a continuous course of conduct to conceal adverse material information about Delivery Agent,
25 its IPO prospects, and the proprietary nature of its intellectual property, as described herein.

26 111. The Defendants had actual knowledge of the misrepresentations and omissions of
27 material facts set forth herein, or acted with reckless disregard for the truth in that they failed to
28 ascertain and to disclose such facts, even though such facts were available to them. The

1 Defendants' material misrepresentations and/or omissions were done knowingly and recklessly
2 and for the purpose and effect of concealing negative information that assured that Delivery
3 Agent could not go public, that no buyer would buy Delivery Agent, and that bankruptcy was
4 highly likely.

5 112. Plaintiffs would not have purchased the Securities if they had been aware of the
6 material information omitted by the Defendants and/or known the truth about the false and
7 misleading statements made by the Defendants.

8 113. Plaintiffs' damages were directly and proximately caused by Defendants'
9 wrongful conduct in that the actions that were the subject of Defendants' omissions and false
10 statements ensured that Delivery Agent could not go public and that Delivery Agent would have
11 no value to a prospective buyer.

12 114. Plaintiffs have suffered damages in that they paid \$18 million for the Securities
13 that are now worthless.

14 115. This action was filed within two years of discovery of the fraud and within five
15 years of Plaintiffs' purchases of the Securities.

16 **COUNT II**

17 For Violation of § 20(a) of the Exchange Act
18 Against All Defendants

19 116. Plaintiffs incorporate ¶¶ 1 through 104 and 107 through 115 by reference.

20 117. This Count is brought against all Defendants pursuant to Section 20(a) of the
21 Exchange Act (15 U.S.C. § 78t(a)).

22 118. The Defendants exercised their power and authority to engage in the wrongful
23 acts alleged herein. The Defendants were "controlling persons" of Delivery Agent within the
24 meaning of Section 20(a) of the Exchange Act. In that capacity, they participated in the
25 unlawful conduct alleged that caused Plaintiffs the damages alleged herein. Each of the
26 Defendants, therefore, acted as a controlling person of Delivery Agent.

27 119. By virtue of their high-level positions, their participation in and/or awareness of
28 Delivery Agent's operations, and their ability to influence and control Delivery Agent's

1 operations and business, including securities offerings, the Defendants had the ability and
 2 authority to influence and control, and did influence and control, directly and indirectly,
 3 decision-making at Delivery Agent, including the content of and dissemination of materials
 4 containing the statements and omissions described herein in connection with the offer for sale
 5 and sale of the Securities.

6 120. Because of their senior positions at Delivery Agent and/or their direct personal
 7 involvement in the matters described in the Complaint, Defendants had knowledge of the
 8 material omissions of fact and false representations described in this Complaint before they were
 9 disseminated to Plaintiffs and others.

10 121. As Delivery Agent's officers and/or directors, the Defendants had a duty to
 11 disseminate accurate and truthful information with respect to Delivery Agent's business and
 12 affairs.

13 122. By reason of their positions as senior management and/or directors of Delivery
 14 Agent, each of the Defendants had the power to direct the actions of, and exercised the same to
 15 cause, Delivery Agent to engage in the unlawful acts and conduct complained of herein. Each of
 16 the Defendants exercised control over the general operations of Delivery Agent and possessed
 17 the power to control the specific activities that comprise the primary violations described in the
 18 Complaint.

19 **COUNT III**

20 **Fraud – Intentional Misrepresentation or Omission** 21 **Against All Defendants**

22 123. Plaintiffs incorporate ¶¶ 1 through 104 by reference.

23 124. This Count is brought against all Defendants.

24 125. The Defendants made or approved the false and/or misleading statements
 25 described in the Complaint. The Defendants knew the statements were false and/or misleading
 26 when they made them in that they contained material misrepresentation, concealed material
 27 facts, and failed to disclose material facts necessary to make statements that were made, in light
 28 of the circumstances under which they were made, not misleading.

1 126. The Defendants knowingly and intentionally made the false and/or misleading
2 statements described herein. The Defendants also knowingly and intentionally failed to disclose
3 material information to Plaintiffs. In the alternative, the Defendants acted recklessly when they
4 made the false and/or misleading statements and/or and the omissions described herein.

5 127. It was the Defendants' intent that Plaintiffs would rely on the Defendants' false
6 and/or misleading statements and omissions. Plaintiffs reasonably relied on the Defendants'
7 false and/or misleading statements and omissions. Plaintiffs, as investors, were entitled to rely
8 on the Defendants' representations. Plaintiffs reasonably believed that Defendants'
9 representations were truthful, accurate, and did not omit any material information.

10 128. Plaintiffs would not have purchased the Securities if they had known that
11 Defendants' representations were false and/or misleading or that Defendants had omitted
12 material facts. Plaintiffs' reliance on the Defendants' representations and omitted material facts
13 were a substantial factor in causing Plaintiffs' injuries.

14 129. Plaintiffs' damages were directly and proximately caused by the Defendants'
15 conduct in that the Securities are worthless because Delivery Agent never filed for an IPO and
16 attempts to sell Delivery Agent were unsuccessful because the company's core technology did
17 not work and was not proprietary.

18 130. Plaintiffs have suffered damages because the \$18 million in Securities Plaintiffs
19 purchased are now worthless.

20 131. The Defendants' conduct was malicious, fraudulent, and oppressive within the
21 meaning of California Civil Code § 3294 and was undertaken by the Defendants with the intent
22 to deprive Plaintiffs of property, money, and/or legal rights and constitutes conduct that is
23 despicable, subjecting Plaintiffs to a cruel and unjust hardship in conscious disregard of their
24 rights, so as to justify an award of exemplary and punitive damages according to proof.

25 132. This action was filed within three years of discovery of the fraud.

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COUNT IV

Negligent Misrepresentation
Against All Defendants

133. Plaintiffs incorporate ¶¶ 1 through 104 by reference.

134. This Count is brought against all Defendants.

135. The Defendants made or approved the false and/or misleading statements described in this Complaint.

136. The Defendants lacked reasonable grounds to believe that the alleged false and/or misleading statements were true.

137. Plaintiffs would not have purchased the Securities if they had known that Defendants' representations were false and/or misleading.

138. Plaintiffs' damages were directly and proximately caused by the Defendants' negligent conduct in that the Securities are worthless because Delivery Agent never filed for an IPO and attempts to sell Delivery Agent were unsuccessful because the company's core technology did not work and was not proprietary.

139. Plaintiffs have suffered damages because the \$18 million in Securities Plaintiffs purchased are now worthless.

140. This action was filed within three years of discovery of the negligent misrepresentations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment as follows:

- A. Awarding Plaintiffs damages, including interest;
- B. Punitive damages in an amount to be determined at trial; and
- C. Awarding such equitable/injunctive or other relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial.

DATED: February 21, 2017

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